United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1169

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To be argued by
ALLEN R. BENTLEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1169

UNITED STATES OF AMERICA,

Appellee,

—v.—

DAVID LEE WILLIAMS, a/k/a "DAVID LATTIMORE WILLIAMS," "DONALD FERNANDEZ," "SAMUEL JOHNSON," "LOUIS JACKSON," "DARRY L. WILLIAMS," and "DARRY LARRY WILLIAMS,"

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ALLEN R. BENTLEY,
LAWRENCE B. PEDOWITZ,
JOHN C. SABETTA,
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UNITED STATES OF AMERICA,

Appellee,

—v.—

DAVID LEE WILLIAMS, a k a "David Lattimore Williams," "Donald Fernandez," "Samuel Johnson," "Louis Jackson," "Darry L. Williams," and "Darry Larry Williams,"

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

David Lee Williams appeals from an order of the Honorable Lloyd F. MacMahon entered on March 18, 1976, denying his motion to dismiss an indictment on the ground that a trial would violate his rights under the Double Jeopardy Clause of the Fifth Amendment.

Indictment 75 Cr. 992, filed on October 16, 1975 in eight counts, charged Williams and Jose Sanchez with making false statements for the purpose of influencing the action of two federally-insured banks on applications and loans, in violation of Title 18, United States Code, Section 1014, and with conspiracy so to do, in violation of Title 18, United States Code, Section 371. The indict-

ment charged that on six occasions between March 18, 1975 and July 10, 1975, Williams had submitted fraudulent loan applications to the Manufacturers Hanover Trust Company (Counts Two, Three, Five, Six and Eight) and to the First National City Bank (Count Seven). Williams was also charged with aiding and abetting Sanchez in the submission of a fraudulent loan application to the Manufacturers Hanover Trust Company on May 13, 1975 (Count Four).*

Trial began on November 24, 1975 and ended during defense counsel's opening statement, when the Court declared a mistrial on the ground that the defendant was not being competently represented. Shortly thereafter, Williams' present attorney was assigned, and a motion was filed to dismiss the indictment on the ground that a second trial would violate the protection against double jeopardy. Williams now appeals from the denial of that motion.

Statement of Facts

Pre-Trial Proceedings

As a case related to 75 Cr. 890, which named only Williams as a defendant, the instant indictment, 75 Cr. 992, was referred to Judge MacMahon immediately upon being filed. At a pre-trial conference held on October 16, 1975, co-defendant Sanchez pleaded guilty and a trial of Williams was scheduled for November 24, 1975.

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* In addition to the direct submission of one application, Sanchez was charged with aiding and abetting Williams in connection with a number of the applications submitted by Williams. Sanchez pleaded guilty to Count One, the conspiracy charge, on October 16, 1975 and on January 14, 1976 was sentenced to three years' probation pursuant to Title 18, United States Code, Section 5010(a).

Following the pretrial conference, defense counsel advised the Government of his intention to seek a determination that Williams was not mentally competent to stand trial and, if Williams were found competent, to raise an insanity defense. The Government then moved, on consent, for an order pursuant to Title 18, United States Code, Section 4244, authorizing a psychiatric examination of Williams to determine his competency to stand trial and his responsibility for his conduct at the time of the offenses with which he was charged. Such an order was duly signed and filed on November 14, 1975.

Pursuant to the order, on November 20, 1975, Dr. Anneliese A. Pontius examined Williams. In addition, during the week before trial, the Government obtained medical records pertaining to the treatment of Williams at the Rollman Psychiatric Institute in Cincinnati, Ohio and at the New York Medical College Ambulatory Detoxification Program at Flower Fifth Avenue Hospital in New York City. Copies of the records were furnished to Dr. Pontius, who reviewed them before testifying, and to defense counsel.*

The Competency Hearing

Proceedings on November 24, 1975 began with a competency hearing. The defense called Dr. Norman Weiss, a psychiatrist.

By refreshing Dr. Weiss' recollection, defense counsel sought to show that Dr. Weiss had seen Williams on

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* Although Williams had reported his hospitalization at the Rollman Institute to Dr. Weiss, a psychiatrist employed by the defense, at an examination more than a month and a half before trial (26a, 27a), the records pertaining to that hospitalization had not been obtained by defense counsel.

October 24, 1975. Defense counsel then stated that he himself was "confused" (26a), and further testimony appeared to establish that Dr. Weiss had conducted an hour-long examination of Williams on October 6, 1975.

Dr. Weiss then expressed an opinion that Williams was not competent to stand trial on the date of his examination. (26a). Upon further questioning by the Court, however, Dr. Weiss acknowledged that Williams had been able to communicate with him (29a); that he understood the nature of the charges (30a); that he had spoken with his attorney and understood what his attorney said to him about the charges, the defense, and the trial (30a); that he had a grasp of reality (31a); and that he was essentially competent to stand trial in terms of the applicable legal standard (33a). The Government did not cross-examine Dr. Weiss.

The Government then called Dr. Pontius, who testified that in her opinion Williams was competent to understand the nature of the charges (36a) and properly to assist in his own defense. (37a). Dr. Pontius, who had spoken with Williams for two hours four days earlier (35a-36a), found that Williams had no psychosis, no impairment of his thinking process, and no difficulty in retaining thoughts in his mind and acting upon them. (37a).

On cross-examination, defense counsel sought to show that Williams had been classified as a schizophrenic at the Rollman Institute (38a)—a diagnosis which Dr. Pontius viewed as unsubstantiated by sufficient facts in the medical records (41a)—and that the electro-shock treatment which Williams had there received may have impaired his memory of the facts surrounding the offenses charged in

the indictment.* Dr. Pontius testified that memory impairment resulting from electro-shock treatment would not last more than eight or nine months (41a-42a), citing as evidence of Williams' present memory capacity his ability to repeat six arbitrary digits backwards and forwards (42a) and to recall the food he had fixed for dinner on the previous day. (43a). Defense counsel then sought to show memory impairment by questioning Dr. Pontius, *inter alia*, concerning the accuracy of statements made to her by Williams concerning his employment and his mother. (46a). Finally, defense counsel elicited that Williams had told Dr. Pontius that he connected electro-shock therapy with accidental electrocution. (47a).

On redirect examination, the Government established that Williams, in his interview with Dr. Pontius, had promptly relinquished his opinion connecting electro-shock with electrocution when the difference between them was explained, which behavior was uncharacteristic of a schizophrenic. (49a). On recross-examination, defense counsel, in the face of repeatedly sustained objections, asked a series of questions, which the Court characterized as "not directed to the issue, . . . argumentative, bad in form . . . horrible" (50a), generally directed to the source of Williams' opinion of electro-shock therapy. Dr. Pontius testified that Williams' opinion was consistent with current cultural views of such treatment as harmful to the brain (49a), and that Williams had told her he had "heard" that such consequences might ensue. (50a).

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* At the competency hearing, Dr. Weiss stated that Williams had been hospitalized in 1964. (27a). In questioning Dr. Pontius, defense counsel assumed that the hospitalization had occurred 12 years earlier, *i.e.*, in 1963. (38a). The medical records, however, which were not made a part of the record below, show that Williams was a patient at the Rollman Institute from June 15 to November 9, 1961.

At the conclusion of the hearing, the Court ruled that Williams was competent to stand trial, finding that he understood the nature of the charges and was able to communicate with counsel.

The Government Opening

After the defendant was found competent to stand trial, a jury was selected and the prosecutor delivered an opening statement. The prosecutor began by telling the jury that Williams was charged with conspiracy and with making false statements on bank loan applications. (53a-54a). He identified the defendant, mentioning the various pseudonyms allegedly used, and introduced himself. (54a). He then outlined the proof to be presented on the Government's case. This proof was to consist of the loan documents themselves, expert handwriting testimony, identification testimony by a bank employee, evidence that the employment references given by Williams on the loan applications were false, documents seized from Williams at the time of his arrest,* and a confession.

The prosecutor further advised the jury that it would probably hear psychiatric testimony on the question of whether or not Williams was responsible for his conduct, and the Assistant presented a synopsis of the factors which the jury might consider in evaluating the merit of that defense. Finally, the Assistant stressed the importance of the case and urged the jury to listen closely

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* Included among the documents were an Abraham & Straus credit card in the name of Sherman Etra (the cosigner on the Donald Fernandez loan, on which Count Three was based), a Macy's credit card in the name of Samuel Johnson (the name used on the loan application in Count Five), a New York City Board of Elections identification card in the name of Louis Jackson (the name used on the loan application in Count Six), and a blank New York City Board of Elections identification card.

to the evidence and apply the law as instructed by the Court.

The Defense Opening

Defense counsel then delivered the following opening statement, which prompted the admonitions and ruling indicated in the record:

> "Mr. Guttman: Good afternoon, Ladies and gentlemen, my name is John Guttman. I represent Mr. David Williams. The defense in this case contends that Mr. Williams is not legally responsible for what he may have done but the threshold question that you must decide is did the government prove that he did do what they charge him with?
>
> It sounds like I am talking out of two sides of my mouth but let me explain. The government has the obligation and the burden——
>
> The Court: Leave the law to the court.
>
> Mr. Guttman: ——of proving the elements of the crime beyond a reasonable doubt. It's their burden of proof. The judge will explain that to you. You must be convinced that the government has proven what it said it will prove. If you are not convinced——
>
> The Court: Mr. Guttman, please leave the law to the court. Do I make myself clear?
>
> Mr. Guttman: I am not talking about the law, Judge.
>
> The Court: Yes, you are.
>
> Mr. Guttman: Then we get to the second part of that question, that if you are convinced that he did do what the government said he did, was he

legally responsible for those acts? If you find that the government has not met its burden you don't have to consider the question of whether——

The Court: Please, Mr. Guttman.

Mr. Guttman: How can I explain my insanity defense——

The Court: Say what you intend to prove and not what the law is. Please don't make me call that to your attention again.

Mr. Guttman: I will call witnesses to tell you, ladies and gentlemen of the jury, what was done to Mr. Williams in the past, what was done to Mr. Williams in the near past, what Mr. Williams sutters from, why he suffers from those mental defects, how it came about, what tests were done to him, what people have said in reference to his illness and I am sure you will be convinced, as I am, that Mr. Williams is not legally responsible for what the government claims he did.

But first there is the presumption of innocence. He is presumed innocent. You are not to decide whether he is innocent or guilty. You are to decide whether he is guilty. He is presumed innocent——

The Court: Please, Mr. Guttman. Would you like to put this robe on? I am sorry, I must declare a mistrial. This defendant is not competently represented." (60a-62a).

The Opinion of the District Court

Following the mistrial, the District Court assigned new counsel to represent Williams. A motion was filed seeking dismissal of the indictment on the ground that a

trial would violate the Double Jeopardy Clause. On March 18, 1976, the District Court filed an opinion denying the motion, holding, *inter alia*, that:

> "[U]pon the [competency] hearing . . . neither the defense witness nor defense counsel was aware of what facts were material to the issue of competency to stand trial. Specifically, defense counsel did not seem to know what questions to ask, nor how to ask them, and the witness, manifestly without legal guidance, was almost totally unprepared to testify. As a result, we were compelled to take over the examination, both of defense witnesses on direct and the government's psychiatrist on cross.
>
> Upon completion of the hearing, we found defendant competent to stand trial, a jury was selected, and the trial began. During the first few minutes of defense counsel's opening statement, we were obliged to interrupt and warn him three times not to instruct the jury on the law. Nevertheless, he failed to heed our advice, and, by the fourth time, we were left with no choice but to conclude that counsel was either unwilling or unable to make a distinction between questions of law and issues of fact."
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> * * *
>
> "Our assessment of counsel's ineptness and inability competently to represent his client, especially in light of the insanity defense, was not erratic . . . but was based on a reasonable apprehension, fortified by long experience as a trial judge, that the accused would not be fairly represented. The constitution requires that a defendant in a criminal case be represented by counsel. The Criminal Justice Act was passed to assure that an indigent defendant in a federal court receive experienced and adequate representation. The Chief

Justice has, however, warned of the disservice to the hapless client when the Act is used to provide on-the-job training for the amateur or inexperienced attorney.

The federal courts have the duty to implement the policies embodied in the Criminal Justice Act, as well as to ensure the general fairness of a criminal proceeding. This duty extends beyond the standards required by the constitution and must prevent even the possibility of unfairness. A district judge, therefore, cannot always remain a passive bystander but may have to intervene to assure that the facts of each case are presented to the jury in a clear and straightforward manner. He must be especially careful to avoid prejudice which may not be fully depicted in the record on appeal."

* * *

"Our exclusion of defense counsel was compelled by the same duty to assure a clear presentation of the case to the jury and to safeguard the rights of the defendant. Once it became clear to us that the lawyer assigned by the magistrate to represent this indigent defendant was too inexperienced, unprepared, and incompetent to present defendant's case to the jury, it became our plain duty to abort the trial.

A court cannot stand idly by while the poor are assigned lawyers too inexperienced or incompetent to be retained on a competitive basis in the open market. Equal justice becomes a mockery when the quality of representation upon a criminal trial depends solely upon the accused's ability to pay. Although no court can assure that each defendant is represented by an equally skilled attorney, a court must intervene when the quality

of representation falls below the level necessary to achieve some semblance of the adversary process so essential to focusing issues of fact for enlightened resolution by a jury.

This court's declaration of a mistrial does not bar retrial of the defendant. Substantial harm could result if, because of the double jeopardy clause, a court felt compelled to allow a trial to continue although the accused was not adequately represented. It would be inconceivable to require a trial judge to rely on the chance that a cold record will shock the conscience of an appellate court when an incipient miscarriage of justice is growing before his eyes." (11a-16a) (footnotes omitted).

ARGUMENT

Retrial of Williams would not violate his double jeopardy rights.*

The Fifth Amendment provides in part:

". . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life and limb . . ."

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* We continue to believe, and most respectfully urge, that this Court is without jurisdiction to entertain this interlocutory appeal, notwithstanding the Court's continuing adherence to a contrary view. *United States* v. *Alessi*, slip op. 3881, 3884-85, Dkt. No. 76-1044 (2d Cir. May 26, 1976); *United States* v. *Beckerman*, 516 F.2d 905, 906-07 (2d Cir. 1975). *Alessi* and *Beckerman*, we submit, are wrongly decided. Neither opinion even cites, much less distinguishes, two Supreme Court opinions, *Heike* v. *United States*, 217 U.S. 423, 433 (1910) and *Rankin* v. *The State*, 78 U.S. (11 Wall) 380 (1870), which, fairly read, plainly hold that this Court lacks jurisdiction to hear an interlocutory appeal premised on double jeopardy grounds. A more complete statement of our view of this matter, to which we respectfully refer the Court, is set forth in our brief on appeal in *United States* v. *Alessi*, Dkt. No.

[Footnote continued on following page]

This Court, in summarizing the application of the Double Jeopardy Clause, has stated:

> "[D]ouble jeopardy normally attaches upon the empaneling of a jury competent to try the defendant, for it is then that a defendant is 'put in jeopardy.' *Illinois* v. *Somerville*, 410 U.S. 458, 467, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973); *United States* v. *Jorn*, 400 U.S. 470, 479, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971); *Green* v. *United States*, 355 U.S. 184, 188, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957); *Wade* v. *Hunter*, 336 U.S. 684, 688, 69 S.Ct. 834, 93 L.Ed. 974 (1949); *Kepner* v. *United States*, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114 (1904). Having been 'put in jeopardy,' the defendant is thought to have the right to seek a favorable verdict from the jury which he has accepted as satisfactory. See *United States* v. *Jorn*, *supra*, 400 U.S. at 486, 91 S.Ct. 547; *Downum* v. *United States*, 372 U.S. 734, 736, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963); *Wade* v. *Hunter*, *supra*, 336 U.S. at 689, 69 S.Ct. 834."

United States v. *Glover*, 506 F.2d 291, 294 (2d Cir. 1974).

The protection against double jeopardy does not, however, preclude a retrial where the first trial was terminated before verdict at the request, or with the consent, of defendant, *United States* v. *Dinitz* — U.S. —, 44 U.S.L.W. 4309 (March 8, 1976); *United States* v. *Beckerman*, 516 F.2d 905 (2d Cir. 1975), or where so terminated without the consent of the defense where warranted by a "manifest necessity" or if "the ends of public justice

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76-1189, filed with this Court on June 1, 1976. Oral argument in *Alessi* was heard by the Court (Friendly, Feinberg and Van Graafeiland, *CJJ.*) on June 9, 1976. The matter is *sub judice*.

would otherwise be defeated," *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). Although there exists no rigid formula which can mechanically be applied in determining whether a trial may be terminated without the consent of the defense after jeopardy has attached, *Wade* v. *Hunter*, 336 U.S. 684, 691 (1949), the trial court's scope of legitimate discretion must necessarily include authority to declare a mistrial for the purpose of protecting a defendant from the incompetence of counsel who has been imposed on the defendant by the court, pursuant to the Criminal Justice Act. *Compare Gori* v. *United States*, 367 U.S. 364 (1960).

In *Gori*, the Court affirmed a conviction after a second trial following an initial trial which had been terminated, *sua sponte*, by the trial judge, in the belief that the prosecutor was about to elicit improper and prejudicial matter from a Government witness. The Court refused to bar retrial "where it clearly appears that a mistrial has been granted in the sole interest of the defendant." 364 U.S. 369. The limits of the teaching of *Gori* were clarified in *United States* v. *Jorn*, 400 U.S. 470 (1971), in which a plurality of the Court found that the Double Jeopardy Clause precluded retrial where the first trial ended in a mistrial which had been declared to protect the rights of prospective Government witnesses against self-incrimination. *Gori* and *Jorn* were both cited with approval in *Illinois* v. *Somerville*, 410 U.S. 458 (1973), which permitted a retrial where, after selection of the first jury, and before the taking of any evidence, it was realized that the indictment was jurisdictionally defective under State law, and hence that any conviction would have been subject to certain reversal on appeal under State law.

In *United States* v. *Gentile*, 525 F.2d 252 (2d Cir. 1975), this Court applied the foregoing authorities in

considering a claim that prosecution was barred by the Double Jeopardy Clause where the first trial ended with a mistrial, declared because of improprieties in the prosecutor's opening statement, to which the trial court's attention had been called by the defense. Passing what appeared to be implied consent on the part of LaPonzina to the granting of a mistrial motion by his co-defendant, 525 F.2d at 255, *compare United States* v. *Beckerman*, 516 F.2d 905 (2d Cir. 1975), the Court held that *Gori* controlled:

> The facts are indistinguishable from *Gori*, and even if we take that decision as having been qualified by *Jorn* in a manner not wholly eradicated by *Somerville*, this case falls within the *Gori-Jorn* composite standard of lack abuse of discretion in declaring a mistrial because of an inadvertent error of the prosecutor and benefit to the defendant as the sole motivation. 525 F.2d at 257.

In holding that its finding of no abuse of discretion and intent to benefit the defendant flowed *a fortiori* from *Gori*, the Court in *Gentile* weighed the prejudice to the defendant arising from the incident leading to the mistrial declaration, the role of the defendant in inducing the termination of the trial by urging that he had been prejudiced, and the point in the trial at which a mistrial had been declared. *Id.* at 256.

Here, as in *Gentile*, there can be no doubt—and Williams concedes—that the trial court declared the mistrial in the sole interest of the defendant. Accordingly, Williams is required to argue that the lower court abused its discretion in doing so. The claim is meritless. Consideration of the pertinent factors reviewed by the Court in *Gentile* makes it clear that retrial of Williams is not barred by the Double Jeopardy Clause.

First, the trial court found as a fact that the attorney that had been assigned by the court to represent Williams in this case was incompetent. That lack of competent representation not only promised to occasion prejudice to Williams greater than that which stemmed from the prosecutor's questions in *Gori* or the prosecutor's opening in *Gentile*, but it bid fair to secure Williams' conviction. The courts have confirmed, too often to warrant citation, the critical importance of competent defense counsel in criminal litigation. The need for such competent counsel is even greater where, as here, a defendant seeks to interpose a defense of legal insanity.

Contrary to Williams' current assertion (Brief at 22) that "there was no substantial reason to believe that his representation would not have been wholly adequate", Judge MacMahon had ample basis for his finding that Williams was not competently represented. In addition to the conduct of Williams' attorney at the pretrial conference,* the court had an opportunity to observe the manner in which counsel conducted the pretrial competency hearing.

That hearing made plain, and Judge MacMahon correctly found, that "neither the defense witness nor the defense counsel was aware of what facts were material to the issue of competency to stand trial" (11a) (footnote omitted.** Although Dr. Weiss, the defense psychiatrist,

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* At that pretrial conference, on October 16, 1975, defense counsel was not prepared to say whether a suppression motion would be filed (70a-71a) or whether an insanity defense would be raised (73a)—this notwithstanding that he was not new to the case, having been assigned to represent Williams by the United States Magistrate (15a) at the time of Williams' arrest on August 29, 1975 (1a).

** Williams' current argument (Brief pp. 13-16) that his trial counsel elicited a number of important facts *relevant* to the competency issue somewhat misses the forest for the trees, in light of that attorney's manifest ignorance of what was *material*.

had testified on direct examination that in his opinion Williams was not competent to stand trial, on questioning by the court his answers revealed that the defendant fully met the legal standards of competency (32a-33a), *see* Title 18, United States Code, Section 4244; *Dusky* v. *United States*, 362 U.S. 402 (1960), a fact which amply w[illegible]anted a finding that defense counsel had failed to interview the witness with a view to establishing whether or not he could make out a *prima facie* case of incompetence. Indeed, defense counsel was "confused" even as to the date of the examination of defendant by Dr. Weiss. (26a). Moreover, defense counsel in his cross-examination of the Government's psychiatrist asked questions which were not directed to the issue, were "argumentative and bad in form." (50a).

Equally important, perhaps, in this case where, in the event of a trial, the principal, and only genuine, defense was to be Williams' lack of criminal responsibility (see 10a), Dr. Weiss' hearing testimony strongly suggested that both he and defense counsel were largely ignorant of the prevailing definition of legal insanity used in the federal courts. Compare Dr. Weiss' testimony at the competency hearing (10a-11a) with *United States* v. *Freeman*, 357 F.2d 606 (2d Cir. 1966); *cf. Wilson* v. *Reagan*, 354 F.2d 45, 46 n.1 (9th Cir. 1965) (ignorance of pertinent sentencing provision, *inter alia*, warranted finding of incompetence).

All this was just a prelude to the defense opening, during which the court tried repeatedly, and in vain, to prevent defense counsel from arguing matters of law to the jury.* The restraint shown by the court in allowing

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* The court's admonitions to defense counsel during the opening were well within the authority of the court to regulate the conduct of trial. *United States* v. *Freeman*, 514 F.2d 1184, 1191-1192 (10th Cir. 1975); *Lichtenwalter* v. *United States*, 190 F.2d

[Footnote continued on following page]

defense counsel to continue representing defendant after the competency hearing certainly did not preclude the court from considering his performance in the hearing as a cumulative factor in determining whether or not defendant's rights would be adequately protected by competent representation. Nor can it be said, as now argued by Williams, that the trial court's scope of discretion is limited to the stringent definition of ineffective assistance of counsel which must be met to warrant reversal on appeal on that ground, see, *e.g.*, *United States* v. *Badalamente*, 507 F.2d 12, 21 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975). An exacting standard is applied in evaluating post-conviction attacks on the competency of unsuccessful trial counsel because such proceedings are rightly viewed as holding significant potential for litigious second-guessing, *see Diggs* v. *Welch*, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945), *cited with approval in United States* v. *Wight*, 176 F.2d 376 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950). To prevent a

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36 (D.C. Cir. 1951); *cf. United States* v. *Conti*, 361 F.2d 153, 158 (2d Cir. 1966), *vacated on other grounds*, 390 U.S. 204 (1968). Indeed, the Chief Justice has recently said that "a trial judge . . . [has] plenary control of the conduct of counsel particularly in relation to addressing the jury"; and that "[a]n opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument." *United States* v. *Dinitz*, *supra*, 44 U.S.L.W. at 4313 (concurring opinion). In light of the foregoing, Williams' reliance on manuals on trial techniques, which are unsupported by judicial authority, for a somewhat contrary view is not persuasive.

In any event, it was not defense counsel's opening statement *per se* which precipitated the declaration of a mistrial, but his earlier displayed incompetence coupled with his inability or unwillingness to distinguish between questions of fact and questions of law (12a). The trial court could properly have concluded that defense counsel's repeated failure to heed its express directions presaged numerous further encounters of like nature between court and counsel—in the jury's presence—all to the detriment of defendant Williams.

trial court from taking action to protect the defendant when convinced from the performance of defense counsel that "an incipient miscarriage of justice is growing before his eyes" (16a) would, we submit, unwisely fetter a trial court's discretion and undermine the long-recognized right of an accused to more than a mere semblance of representation.

Second, although there was no motion by the defendant or the Government with respect to the competency of defense counsel, we submit that in a matter of this nature protection of the defendant lies particularly in the hands of the court. One could hardly expect a court-appointed attorney to move for a mistrial on the ground of his own incompetence; nor would a defendant, particularly in a case involving the arcane field of diminished criminal responsibility, be competent to assess the effectiveness of his assigned counsel. In these circumstances, a trial court has an affirmative duty independently to assess the competence of counsel it has assigned to the indigent defendant, and *sua sponte* to replace that attorney where, as here, it is necessary to do so to protect a defendant's rights. "Fundamental fairness to a person accused of crime requires such judicial guidance of the conduct of a trial that when it becomes apparent appointed counsel are not protecting the accused the trial judge should move in and protect him." *MacKenna* v. *Ellis*, 280 F.2d 592, 600 (5th Cir. 1960).

Finally, here, as in *Gentile*, no testimony had been taken when the mistrial was declared. While it is undisputed that Williams had been placed in jeopardy, "the length of his exposure at the first trial is a relevant consideration" "in weighing the harm to the defendant incident to a new trial against the desirability of the court's protecting a defendant from prejudice. . . ." *United States* v. *Gentile*, 525 F.2d at 256 n.2. Against

that limited exposure at the trial in progress, the trial court had to weigh the likelihood of a conviction (given counsel's apparent unfamiliarity with the insanity defense he had chosen to raise), a subsequent, lengthy appeal and, if a reversal were secured, a second prosecution—at which the defendant's phychiatric history would again be exposed in a public forum for all to see. In these circumstances, Judge MacMahon's declaration of a mistrial served "objectives not unlike the interests served by the Double Jeopardy Clause—the avoidance of the anxiety, expense and delay occasioned by multiple prosecutions." *United States* v. *Dinitz*, *supra*, 44 U.S.L.W. at 4312. In no sense did the trial court's zealous solicitude for the defendant's rights constitute an abuse of discretion.*

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* Defendant's argument that the trial court abused its discretion by not considering less drastic sanctions than a mistrial is untenable. Aside from the fact that this Court, in *Gentile*, held the trial court's failure to consider less drastic means "immaterial," 525 F.2d at 528, removal of the attorney involved here was the only effective response to his demonstrated incompetence. Simply terminating defense counsel's objectionable opening not only would have prejudiced Williams, but would have served only to defer the larger problem to a later stage of the trial. The alternative action suggested by Williams in support of his motion to dismiss the indictment, but abandoned on this appeal—that the District Court should have suspended the trial and sought a competent attorney willing, on scarcely a moment's notice, to assume responsibility for representing a defendant in a criminal jury trial already underway, in which an insanity defense had already been previewed for the jury—is completely unrealistic.

CONCLUSION

The order denying the motion to dismiss the indictment should be affirmed.

Respectfully submitted,

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